of the section. There is the further difficulty that even if such incorporeal right could be the subject of criminal breach of trust, the mortgagee's rights were never "entrusted" to the appellant, and without such an "entrustment" a conviction under s. 405 cannot stand.

It is clear however that the verdict of the jury involved a finding that the appellant made away with the two tongkangs by altering them and registering them in other persons' names with a view to defrauding the complainant. The offence proved seems clearly to fall under s. 424 of the Penal Code in that the appellant was found to have dishonestly or fraudulently concealed or removed the two tongkangs in question. Sections 176 and 177 sub-s. 1 of the Criminal Procedure Code are accordingly applicable, and it was open to the jury to convict the appellant of the offence which he is shown to have committed although he was not charged with it.

Now s. 7 sub-s. 2 of the Court of Criminal Appeal Ordinance (Cap. 11) reads as follows:—

> "Where an appellant has been convicted of an offence and the jury could on the charge have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence is substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

For the reasons stated this Court is satisfied that the verdict of the jury involved a finding of the necessary facts which would constitute an offence under s. 424.

The verdict is accordingly set aside and a conviction on both charges under s. 424 substituted. As the maximum punishment under s. 424 is only two years, as compared with a maximum sentence of three years under s. 405, the sentence will be reduced to 12 month rigorous imprisonment on each charge such sentences to run concurrently.

Order accordingly.

Solicitors for the appellant.—*Drew & Napier.*

[APPELLATE CRIMINAL JURISDICTION]

GORDON SMITH, J.

September 24, 1937.

IN THE MATTER OF A CASE STATED UNDER S. 317 OF THE CRIMINAL PROCEDURE CODE BY THE MAGISTRATE, BUKIT MERTAJAM

and

IN THE MATTER OF YACOB BIN LEBAI MAT and PIN BIN WAHAB.

[PENANG SPECIAL CASE No. 24 of 1937]

Criminal Procedure Code, Ss. 76 and 78.

Hiding behind a coconut tree does not of itself bring anyone within the ambit of S. 76 sub-S. 1 (a) of the Criminal Procedure Code. There must not merely be the taking of precautions to conceal the presence but there must also be reasons to believe that such precautions are taken with a view to committing an offence.

CASE STATED.

The facts and arguments appear sufficiently from the judgment.

At the conclusion of the hearing the Judge discharged the order made and stated that he would give his reasons for so doing later and in writing.

F. GORDON SMITH, J.—This matter came before me on a case stated under S. 317 of the Criminal Procedure Code, by the Magistrate, Bukit Mertajam.

The point for determination was as to whether the provisions of Ss. 76 and 78 of the Criminal Procedure Code had been duly complied with in calling upon the abovenamed to shew cause why they should not be bound over in accordance with the provisions of S. 76.

The facts are that on an information laid against the said Yacob and Pin the Magistrate made an order in the following terms:—

> "Whereas information has been received by this Court at the Court House at Bukit Mertajam that Yacob bin Lebai Mat and Pin bin Wahab were found hiding behind a coconut tree at the compound of 50, Cross Street, at 10 p.m. on 4-7-37. It is hereby ordered that the said Yacob bin Lebai Mat and Pin bin Wahab do shew cause why they should not be ordered severally to execute a bond for their good behaviour in the sum of Fifty Dollars each to be in force for the term of six months with one sufficient surety each being a house-holder."

such order being duly signed, dated and sealed.

The relative provisions of s. 76 of the Criminal Procedure Code are as follows:—

(1) "Whenever it appears to a Police Court on information that (a) any person is taking

precautions to conceal his presence within the local limits of the jurisdiction and that there is reason to believe such person is taking such precautions with a view to committing an offence . . . . such Court may, in manner hereinafter provided require such person to shew cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding six months as the Court thinks fit to fix."

Section 78 provides that the order, which must be in writing shall set forth

(a) the substance of the information received;
(b) the amount of the bond to be executed;
(c) the term for which it is to be in force; and
(d) the number, character and class of sureties, if any, required.

I may say at the outset, that s. 78 was properly complied with. The order itself shewed the substance of the offence as contained in the information, almost *verbatim*, except that the information gave the name of the occupant of the compound at 50, Cross Street.

The defect lies in the information itself. It will be observed that para. (a) of s. 76 sub-s. 1 consists of two parts:—(a) there must be the taking precautions to conceal the presence and (b) there must be reason to believe that such precautions are taken with a view to committing an offence.

The information itself, and consequently the subsequent order, entirely omitted any reference whatsoever to the latter part of the paragraph.

Merely taking precautions to conceal oneself does not bring any one within the ambit of the paragraph and the essential and material part is that there must be an allegation that there is reason to believe that such is done with a view to committing an offence.

In my opinion such omission was fatal and was not such as could be cured either under s. 448 or s. 162. The omission is not a mere error of procedure but is a material and substantive error in not complying with a provision which is mandatory.

This section provides for bringing a person before the Court without charging him with a specific and substantive breach of the criminal law and for ordering such person to give security for future good behaviour and in the event of such security not being forthcoming there is power to order imprisonment up to a maximum of 12 months.

This and the following section contain necessary provisions for the protection of the public against vagrants and other bad characters but the conditions under which such persons can be deprived of their liberty must be strictly complied with.

In this case the fact that there was reason to believe an intention on the part of the two men to commit a crime was an essential element in the information, which was omitted and consequently was not alleged against them and therefore the information, on which the subsequent order was based, was bad *ab initio*.

Judgment Accordingly.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, Ag. C.J.

September 9, 1937.

IN RE SEAH LIANG SEAH DECEASED.

[SINGAPORE ORIGINATING SUMMONS No. 38 of 1937]

Trustees—Beneficiaries—Right to retention of shares of estate and to set-off against liabilities incurred by Trustees personally to the Estate.

A claim was made against trustees of an estate that they had neglected their duty by failing to recover debts due to the estate by reason of which failure any claims against the debtors became barred by limitation and that the trustees or their estate were liable therefor. The trustees were also beneficiaries and the applicant, another trustee, now sought to retain the beneficial interests of the beneficiary-trustees so far as was required to make up the loss to the estate caused by the alleged breach of duty.

Held, that where there is an aggregate fund in which the trustee is beneficially interested and to which he owes something, he must be taken to have paid himself that amount on account of his share; and the Court treats the trustee as having received his share by anticipation. And such a claim against trustee beneficiaries to retain the share of the trustee-beneficiaries in the estate must be a claim in respect of a debt which he owes the estate. It does not apply to the trustee beneficiaries liability for devastavit until such claims have been established, if it cannot be said that part of the trust estates has already come into their hands or that they have been paid their shares *pro tanto*.

ADJOURNED ORIGINATING SUMMONS.

Dr. Withers Payne for Applicant Trustee, Seah Eng Thye.

Seth for Respondents, Seah Eng Kiong and Seah Eng Tong, Co-trustees

Johannes for Respondent, Seah Eng Teck, Retired Trustee.